Supreme Court, U. S.
FILED
JUL 29 1976

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1657

STATE OF NORTH CAROLINA,
*Petitioner,*

*v.*

FEDERAL POWER COMMISSION,
*Respondent,*

APPALACHIAN POWER COMPANY,
COMMONWEALTH OF VIRGINIA,
STATE OF WEST VIRGINIA,
*Intervenors.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF FOR APPALACHIAN POWER COMPANY IN OPPOSITION

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### OPINIONS BELOW

The March 24, 1976 Opinion of the Court of Appeals is reported at *State of North Carolina* v. *Federal Power Commission*, 533 F.2d 702 (D.C. Cir. 1976). The Federal Power Commission's Opinion No. 698 (Pet. App. p. 62) is reported at 51 FPC 1906 (1974). Its order denying rehearing, Opinion No. 698-A, is not yet reported.

## JURISDICTION

The judgment of the Court of Appeals was entered March 24, 1976. The petition for a writ of certiorari was filed on May 14, 1976.

## QUESTIONS PRESENTED

1. Whether the Court of Appeals properly held that section 313(b) of the Federal Power Act, 16 U.S.C. §825*l*(b), precluded judicial review of the Federal Power Commission's purported lack of consideration of preserving the affected stretch of the New River for possible inclusion in the national wild and scenic rivers system?

2. Whether the Court of Appeals properly vacated its stay of the Federal Power Commission's licensing order for the Blue Ridge project upon its determination that section 7(b) of the Wild and Scenic Rivers Act, 16 U.S.C. §1278(b), did not prohibit the Commission from licensing the project while the Secretary of Interior was considering Petitioner's application to have a stretch of the New River within project boundaries included in the national wild and scenic rivers system?

3. Whether the Court of Appeals erred in directing the Federal Power Commission to modify the license to explicitly provide time and funding for complete research, excavation and salvage of archaeological artifacts?

4. Whether the Court of Appeals erred in finding that the Commission adequately considered energy conservation as an alternative to the Blue Ridge Project?



## STATUTES INVOLVED

Set out in Appendix A hereto are: Sections 4(f), 26, 309 and 313(b) of the Federal Power Act, the Antiquities Act of 1906, 16 U.S.C. 433; Section 470f of Historic Properties Act, 16 U.S.C. 470f; Section 2(a) of the Reservoir Salvage Act of 1960, 74 Stat. 220; and, the Reservoir Salvage Act of 1974, 16 U.S.C. 469-469c. The other statutes involved, namely Section 120(2) (E) of National Environmental Policy Act, 42 U.S.C. 4332(2) (E), and the Wild and Scenic Rivers, 16 U.S.C. §1271 *et seq.*, are set out in the petition of North Carolina (Pet. 6-20).

## COUNTER STATEMENT OF THE CASE

On June 14, 1974, after a proceeding lasting almost twelve years, the Federal Power Commission issued a license to the Appalachian Power Company ("Appalachian" or "the Company") authorizing it to construct, operate and maintain the Blue Ridge hydroelectric project on the New River in southwestern Virginia and northwestern North Carolina. The project would consist of two dams, two powerhouses and various transmission facilities, all of which would be located in the State of Virginia. In addition two reservoirs would be created, a lower reservoir covering some 12,390 acres and an upper reservoir covering some 26,000 acres. Approximately 12,000 acres of portions of each reservoir would be in the State of North Carolina. The reservoirs would affect about 38.6 miles of the New River in Virginia and 4.5 miles of the New in North Carolina. They would also affect about 27 miles of its South Fork and 24 miles of its North Fork, both of which are in North Carolina.[1]

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[1]The New River is 255 miles long (not 220 miles as stated by Petitioner at p. 22) from its confluence with the North and South

[Footnote continued]

The project would provide 1,800,000 kilowatts of electrical generating capacity for periods of up to 12 to 15 hours a day. The license requires the Company to acquire some 6,900 acres on the shore of the upper lake for the development of two state parks at sites previously selected by North Carolina and Virginia. These parks, together with the upper reservoir, are expected to attract more than 6 million visitations a year (R.2241).

The proceeding began on June 20, 1962 when the Company filed an application for a preliminary permit to study the feasibility of the Blue Ridge project pursuant to section 4(f) of the Federal Power Act, 16 U.S.C. 797(f). The FPC granted the application on March 11, 1963, issuing a two-year Permit. The Company filed its license application for the Blue Ridge project on February 26, 1965. It proposed a project with less capacity and smaller dams and reservoirs than was ultimately approved by the FPC. Although the original project was in substantial part supported by the States of Virginia and North Carolina, it was opposed by the Department of the Interior because it was not large enough to encompass all of the multi-purpose features desired by that agency.

Largely in response to Interior's opposition, the Commission Staff and the Company each conducted further studies. On June 14, 1968, the Company filed an amended license application designed to accommodate the objections of Interior as well as those of the two states. The revised application proposed a larger project similar to the one ultimately licensed. The Secretary of the Interior

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Forks in North Carolina to the confluence of the Gauley and the New River in West Virginia. Blue Ridge will inundate about 45 miles of the New. Two existing impoundments already inundate 46 miles of the River. More than 150 miles of the New River will remain in a free flowing state if Blue Ridge is developed.



announced his support of the larger project calling it "a vastly improved and acceptable plan of development . . ."[2]

When the hearings resumed on September 30, 1968, counsel for the Department of the Interior affirmed the support of the Secretary for the modified project (R. 3461-66). Although the position of North Carolina in the course of the resumed hearings was one of support for the project, it did object to the manner in which the project would be operated, particularly with respect to the proposed reservoir drawdowns (R. 4118-4121).

On October 1, 1969, the Administrative Law Judge issued an initial decision, recommending the issuance of a license for the modified Blue Ridge Project. The project would have included, among other things, storage capacity of 650,000 acre feet for water quality control. The States of North Carolina and Virginia both filed exceptions continuing their objections to any drawdowns at the upper reservoir in excess of 10 feet, but otherwise supporting the proposed multi-purpose project. North Carolina specifically objected to the use of the project's storage to abate downstream pollution (R. 15604-609).

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[2]The Department of the Interior News Release, September 18, 1968 (R. 3518-22). The Department's support of the Blue Ridge project was also made clear to the Congress by a deputy assistant secretary in testimony before the Senate Public Works Committee on April 14, 1970 devoted to the Blue Ridge project. Printed Hearings, pp. 72-79.

At the oral argument held before the Commission on February 2, 1970, the Attorney General of West Virginia argued that the project would have adverse environmental and recreational effects on downstream reaches of the New River in West Virginia because of the proposed water quality releases. He requested intervention out of time and an opportunity to present evidence in support of his allegations. The Commission granted his request and the record was reopened for further hearings respecting these matters.[3] After the further hearings and briefing,[4] the Administrative Law Judge issued a Supplemental Initial Decision on June 21, 1971, again recommending issuance of a license. In response to the concerns of West Virginia and others, he recommended a reduction in the size of the downstream pollution dilution releases. The States of North Carolina and Virginia again filed exceptions to his decision objecting to the size of the drawdowns in the upper reservoir. North Carolina repeated its request that the provision for the storage of water for pollution dilution be deleted (R. 16485).

[3]Before this round of hearings was completed, the Company filed a motion, which was later denied, seeking the immediate issuance of a license in view of the fact that the additional evidence to be introduced concerned purely operating matters. (R. 15968-78). The State of North Carolina supported the motion for issuance of license on the condition that three of the license conditions proposed by the Presiding Judge were modified (R. 16029-33). The Secretary of the Interior also supported the motion for immediate issuance of the license. (R. 16007-13)

[4]North Carolina in a brief to the Judge urged, among other requests, that the project be "licensed as quickly as possible so that the citizens of Ashe and Allegheny Counties may make plans for the orderly development of their personal lives and business interests." Reply Brief of North Carolina on Reopened Hearing p. 2.



During the second oral argument before the Commission, counsel for the State of North Carolina indicated that the State would like to see the project built, but opposed drawdowns in excess of 10 feet at the upper lake, the amount of the shoreline to be acquired by the Company and the provision for using water quality storage for pollution dilution purposes downstream in Charleston, West Virginia (R. 7021).[5] The Commission on November 2, 1972 remanded the case for further hearings so that cross-examination could be conducted with regard to the Staff's final Environmental Impact Statement (FEIS) in accordance with the decision of the Second Circuit in *Greene County Planning Board v. FPC*, 455 F.2d 412 (1972), *cert. denied*, 409 U.S. 849 (1972). (R. 17120-17125).

Two weeks prior to the hearings on the FEIS, the Governor of North Carolina, who had taken office in January, 1973, advised the Commission by letter dated July 11, 1973 (R. 7423) that the State was withdrawing its support for the Blue Ridge project. The Governor's letter did not suggest the State was withdrawing its support because of any doubt as to the Company's need for the project or because of any concern for the preservation of the New River as a wild and scenic resource. Rather the action was taken because of the anticipated social impact of the project upon the citizens in Ashe and Allegheny Counties.

North Carolina participated in the hearings on the FEIS and at the conclusion thereof filed briefs along with the other parties on the question of the adequacy of the FEIS. Nowhere in those briefs did North Carolina

[5]All of these concerns of North Carolina were subsequently met by the Commission in the license it issued on June 14, 1974.

question the Company's need for the project or the consideration given in the FEIS to the wild and scenic attributes of the New River. Instead, North Carolina's concerns were addressed almost entirely to the social and economic impact of the project upon the citizens of Ashe and Allegheny Counties. On January 23, 1974 the Administrative Law Judge issued his third decision, finding the FEIS to be adequate and recommending issuance of the license (R. 17319-51).

On June 14, 1974, the Commission issued its Opinion No. 698 in which it unanimously approved the issuance of a license for the Blue Ridge project (R. 17490-17566). The Commission, however, delayed the effective date of the license until January 2, 1975, for the express purpose of affording the Congress an opportunity to enact legislation then pending which would preclude development of the project while the affected reach of the river was studied for possible inclusion in the national wild and scenic river system. No such legislation was enacted. A timely but limited application for rehearing was filed by North Carolina (R. 17671-76) and was denied by the Commission on August 12, 1974 in its Opinion No. 698-A (R. 17716-43).

On March 21, 1974, the General Assembly of North Carolina passed a law designating a 4.5 mile portion of the New River, within the boundaries of the Blue Ridge project, for inclusion in the North Carolina Natural and Scenic Rivers System (G.S. 113A-35.1). Petitioner never advised the Commission of this enactment before the issuance of the license and made no mention of this enactment in its application for rehearing. Almost six months after the license was issued the Governor of North Carolina formally applied, on December 12, 1974, to the Secretary of the Interior pursuant to section



2(a) (ii) of the Wild and Scenic Rivers Act[6] to have the 4.5 miles of the New River designated as a scenic river in the national wild and scenic rivers system.[7] Thereafter, on December 16, 1974, North Carolina requested the FPC to stay the effective date of the license for the project. On December 23, 1974, Petitioner filed motions asking the Court of Appeals to also stay the license order and to give expedited consideration to its request. On December 31, 1974, the Commission denied the request for stay. By order issued that same day, the Court of Appeals denied the request for expedited consideration. On January 2, 1975, the license became effective pursuant to the Commission's order of June 14, 1974 (Opinion No. 698). On January 31, 1975, the Court of Appeals granted a stay of the Commission order under review.

Although in its December 12, 1974 application, the Governor of North Carolina sought to have only a 4.5 mile stretch of the river designated by the Secretary of Interior, guidelines adopted by the Secretaries of Interior and Agriculture for evaluating river areas proposed for inclusion in the national system require that such rivers be at least 25 miles long.[8] On May 22, 1975, the General

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[6] 16 U.S.C. §1273(a) (ii).

[7] Petitioner refers at p. 24 to a preliminary application made to the Secretary of the Interior by the Governor of North Carolina on March 5, 1974. The Wild and Scenic Rivers Act, 16 U.S.C. §1271 *et seq.* has no provision for a preliminary application. In view of the fact the state legislation designating the 4.5 mile reach of river as a scenic river had not even been enacted at that time, the so-called preliminary application of March 5, 1974 could have been nothing more than an inquiry regarding procedures. The letter of the Secretary reprinted at pp. 149-151 of Petitioner's appendix clearly demonstrates the nature of that inquiry.

[8] *Guidelines For Evaluating Wild and Scenic Recreational River Areas*, United States Departments of the Interior and Agriculture, February 1970.

Assembly of North Carolina amended the original act designating the main stem of the New River as a State scenic river by adding 22 miles of the New River's South Fork tributary, for a total of 26.5 continuous miles of river and tributary. Thereafter, on July 11, 1975, the State reapplied to the Secretary of Interior and asked for inclusion of the entire 26.5 miles of river and tributary.

On March 24, 1976, the Court of Appeals issued its opinion, and the clerk entered the court's judgment, unanimously affirming the Commission's licensing order for the Blue Ridge project. In its opinion, the Court vacated its stay of January 31, 1975.

On April 19, 1976, the Department of the Interior published a notice dated April 13, 1976 in the *Federal Register* (41 F. R. 16491) that the Secretary had approved the Governor's application to have 26.5 miles of the South Fork-New River included in the national wild and scenic river system.

## REASONS FOR DENYING THE WRIT

### I.

**THE COURT OF APPEALS PROPERLY HELD THAT SECTION 313(b) OF THE FEDERAL POWER ACT PRECLUDED JUDICIAL REVIEW OF THE COMMISSION'S PURPORTED LACK OF CONSIDERATION OF PRESERVING THE AFFECTED STRETCH OF THE NEW RIVER FOR POSSIBLE INCLUSION IN THE NATIONAL WILD AND SCENIC RIVER SYSTEM.**

Petitioner contends that the Court of Appeals erred in holding that section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b), barred judicial review of Petitioner's argument – raised for the first time on appeal – that the



FPC violated the requirement of section 102(2) (E) of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4332(2) (E), to consider, as an alternative to the Blue Ridge project, preserving the reach of the New River within project boundaries for possible selection as a component of the national wild and scenic rivers system.

The Court of Appeals' disposition of this issue was wholly consistent with a long line of cases of both this Court and of various appellate tribunals. Petitioner cites no case construing section 313(b) of the Federal Power Act or of its companion provision, section 19(b) of the Natural Gas Act,[9] for a different proposition than that held by the Court below. Essentially, Petitioner is asking this Court to review a finding made by the Court below, namely, whether the Petitioner's application for rehearing before the Federal Power Commission did in fact raise the issue of the Commission's purported failure to consider the question of preserving the New River as a wild and scenic river.[10] The Court of Appeals undertook an

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[9] 15 U.S.C. 717r(b).

[10] There was substantial evidence in the record as to the scenic qualities of the entire 255 miles of the New River not just of the 45 miles which would be affected by the Project. (Supplemental Initial Decision of ALJ, R. 16362-64). There was also evidence of the comparative scenic features of nearby streams and rivers (R. 2243, 2393). As part of its consideration of the alternative of preserving the New River, the Commission and the Presiding Judge pointed out that construction of the project would still leave more than 150 miles of the New as a free flowing river including the truly scenic New River Gorge portion in West Virginia (R. 17540, 17332). Interestingly, the Secretary of the Interior proposed to Congress on September 30, 1975, nearly seven months before he acted on North Carolina's proposal regarding a small portion of the upper New River in that State, that a 66 mile stretch of the New River in West Virginia, including the New River Gorge, be designated as a component of the national wild and scenic river system.

extremely careful and diligent effort to ascertain whether the Petitioner or any other party had raised a question in its application for rehearing with respect to any of the many issues raised by Petitioner before the Court. The Court took the extraordinary step at oral argument of requesting Petitioner to file a supplemental pleading setting forth citations to its application for rehearing, as well as to those of others, of points Petitioner was raising on appeal. The Court found that 6 out of 8 issues raised on appeal by Petitioner, including this one, had not been raised before the Commission in any petition for rehearing.

With respect to the wild and scenic river argument, Petitioner referred to one paragraph of its application for rehearing and to certain portions of an untimely application filed by Ashe and Allegheny counties, North Carolina. In holding that these references failed to raise the argument with the specificity necessary to identify it, the Court said (Pet. App. 54-55):

> . . . Paragraph 4 of North Carolina's petition for rehearing simply attacks, in general terms, five of the Commission's findings of fact. These findings state that the Project will provide desirable public benefits, will enhance the aesthetic values of the area and that the Commission complied with the provisions of the National Environmental Policy Act in the licensing proceedings. The National Wild and Scenic Rivers Act is not mentioned. Neither is the Act mentioned in the petition of Ashe and Allegheny counties. The portions of the petition cited to us by North Carolina, while containing a reference to the pendency in Congress of legislation pursuant to the Act, do not state that the Commission failed to consider designation of the New River as an alternative to the Project.



In view of the previous decisions of this Court and of various appellate tribunals regarding the jurisdictional requirements of section 313(b) of the Federal Power Act and of section 19(b) of the Natural Gas Act, review of the lower court's finding on this matter cannot justify the issuance of a writ of certiorari. Section 313(b) "is written in simple words of plain meaning and leaves no room for doubt as to Congressional purposes and intent." *City of Tacoma v. Taxpayers of Tacoma,* 357 U.S., 320, 335-36 (1958). The language of the section "expressly precludes the *consideration* by the court of any objection to an order of the Commission, *unless the objection shall have been urged before the Commission in an application for rehearing." FPC v. Colorado Interstate Gas Company,* 348 U.S. 492, 498 (1955). (Emphasis in original). *Accord e.g., Rhode Island Consumer's Council v. FPC,* 504 F.2d 203, 212 (D.C. Cir. 1974); *Citizens for Allegan County, Inc. v. FPC,* 414 F.2d 1125, 1133-34 (D.C. Cir. 1969); *State of Wisconsin v. FPC,* 201 F.2d 183, 186 (D.C. Cir. 1952).

The Court of Appeals' application of the clear and mandatory exhaustion requirement of section 313(b) was both careful and correct. Invocation of this Court's review on this issue would be wholly unjustified.

## II.

### THE COURT OF APPEALS PROPERLY VACATED ITS STAY OF THE COMMISSION'S ORDER UPON ITS DETERMINATION THAT THE LICENSE FOR THE BLUE RIDGE PROJECT WAS NOT REVOKED BY THE FILING OF AN APPLICATION BY NORTH CAROLINA SEEKING THE DESIGNATION OF A SEGMENT OF THE NEW RIVER AS A WILD AND SCENIC RIVER AFTER THE LICENSE WAS ISSUED BY THE FEDERAL POWER COMMISSION

On December 23, 1974 Petitioner filed with the Court of Appeals a Motion for Stay of the Commission's licensing order and also a motion for expedited consideration by the Court of the Motion for Stay. In its memorandum in support of the motions Petitioner correctly stated that the Commission's licensing order would become effective on January 2, 1975 unless otherwise ordered by the Court.[11] On December 31, 1974 the Court of Appeals denied Petitioner's motion for expedited consideration of the motion for stay. Accordingly, by its terms the licensing order became effective as of January 2, 1975. Section 309 of the Federal Power Act provides that orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe (16 U.S.C. §825 h).

In its motion for stay of the licensing order, Petitioner advised the Court of Appeals that the Governor of North Carolina had made application to the Secretary of Interior, under the Wild and Scenic Rivers Act, 16 U.S.C. 1271 *et seq.*, for designation of a segment of the New River in which the project would be located, for inclusion

[11] A similar statement was made by the Commission in its opinion No. 698 (Pet. App. 126).



in the national wild and scenic river system. Petitioner alleged in its motion for stay that during the study period by the Secretary of the Interior, triggered by the Governor's application, the Commission's licensing order could not become effective. On January 31, 1975, the Court of Appeals stayed the licensing order pending further order of the Court.

Petitioner contends here that the Court of Appeals erred in holding that section 7(b) of the Wild and Scenic Rivers Act, 16 U.S.C. §1278(b) did not prohibit the licensing of the project while the Secretary of the Interior considered the State's application (Pet. 27-35). Alternatively, Petitioner contends that the decision of the Secretary of the Interior made on April 13, 1976, to grant the State's application, as refiled on July 11, 1975, revoked the license and rendered this case moot. For reasons succinctly stated by the Court of Appeals, these contentions are wholly without merit.

As the Court of Appeals pointed out, the Wild and Scenic Rivers Act provides two methods by which a river may be included in the national wild and scenic rivers system: (1) by Act of Congress, section 2(a) (i), 16 U.S.C. §1273(a) (i) and (2) by designation of the legislature of the state through which the river flows, followed by a determination by the Secretary of Interior, upon application of the governor of the state, that the river meets the criteria established by the Act, section 2(a) (ii), 16 U.S.C. §1273(a) (ii).

Rivers designated by Congress as components of the national wild and scenic rivers system are listed in section 3 of the Act, 16 U.S.C. §1274. Rivers selected for study by the Congress as *potential* additions to the system are listed in section 5(a) of the Act, 16 U.S.C. §1276(a).

Section 7(a) of the Act, 16 U.S.C. §1278(a) *inter alia* prohibits the FPC from licensing projects on rivers designated for inclusion in the system by either the Congress or by the Secretary of the Interior. Section 7(b) of the Act, 16 U.S.C. §1278(b) *inter alia* prohibits the FPC for a specified period of years from licensing projects on rivers selected for study as potential additions to the system.

Petitioner contends that the prohibition of section 1278(b) applies not only to the study of rivers selected by the Congress in section 1276 of the Act, but also to *any other river* for which a state may file an application with the Secretary and even if the application is filed *after* a license is issued by the FPC.

The Court of Appeals correctly found that Petitioner's construction of the statute was inconsistent with both its plain meaning and with its legislative history.

Although section 1278(b) is long and somewhat complex, a careful reading leads to an inescapable conclusion: it prohibits the FPC from licensing projects *only* on those rivers listed in section 1276(a) of the Act as potential additions to the system. As the Court of Appeals succinctly stated:

> The pertinent part of section 1278(b), i.e. section 1278(b) (i) and (b) (ii) comprises one sentence of 384 words. The syntax is poor, the language is confusing and at first glance may seem inexplicable. Careful analysis however discloses the sense of the verbiage. The entire sentence relates to those rivers "listed in section 1276(a)" as potential additions to the system. For a ten-year period following October 2, 1968 the Federal Power Commission is forbidden to license the construction of any dam on such a designated river unless the Secretary has determined



> that it should not be included in the system. If the Secretary reports to the Congress his recommendations concerning any river designated as a potential addition to the system an additional period of three years beyond that specified, is allowed for congressional consideration of the report. *If a state, proceeding under section 1273(a) (ii), recommends to the Secretary that any river designated as a potential addition by section 1276(a) be included, then the additional period allowed for action by the Secretary is one year.* (Pet. App. 60) (Emphasis added)

The New River has never been designated under section 1276(a) as a potential addition to the system. Thus, the Court of Appeals correctly held that "Since . . . section 1278(b) applies only to those rivers designated by section 1276(a), it follows that section 1278(b) does not prohibit the licensing of the New River project" (Pet. App. 60-61) (footnote omitted).

Moreover, Petitioner's construction of section 1278(b) would require one to ignore the time period of the licensing moratorium so carefully set forth in that section. Section 1278(b) (ii), extends the prohibition against FPC licensing

> (ii) *during such additional period thereafter* as, . . . in the case of any river recommended to the Secretary of Interior for inclusion in the national wild and scenic rivers system under section 1273(a) (ii) of this title, is necessary for the Secretary's consideration thereof, *which additional period,* however, shall not exceed . . . one year . . . (emphasis added).

The phrases "such additional period" and "which additional period" in section 1278(b) (ii) clearly refer back to the preceding clause in section 1278(b) (i) which provides for a

> *ten year period* following October 2, 1968, *or for a three complete fiscal year period* following any Act of Congress designating any river for potential addition to the national wild and scenic rivers system, whichever is greater . . . (Emphasis added)

Because the licensing moratorium in section 1278(b) (i) applies only to those rivers listed in section 1276(b) (i) as potential additions to the system, it necessarily follows that the "additional period" in section 1278(b) (ii) can apply only to such rivers listed in section 1276(a). Otherwise, the phrases "such additional period" and "which additional period" in section 1278(b) (ii) would be rendered meaningless – a result contrary to the elementary rule of statutory construction that words of a statute are to be given effect and are not to be construed as surplusage. *E.g., U.S. v. Menasche,* 348 U.S. 528, 538-539 (1955); *U.S. v. Wong Kim Bo,* 472 F.2d 720, 722 (5th Cir. 1972); *U.S. v. Johnson,* 462 F.2d 423, 428 (3rd Cir. 1972), *cert. denied,* 410 U.S. 937 (1972). As this Court said in *U.S. v. Menasche, supra:*

> "The cardinal principle of statutory construction is to save and not to destroy." *N.L.R.B. v. Jones & L. Steel Corp.,* 301 U.S. 1, 30, 81 L.ed 893, 907, 57 S. Ct. 615, 108 ALR 1352. It is our duty "to give effect, if possible, to every clause and word of a statute," *Montclair v. Ramsdell,* 107 U.S. 147, 152, 27 L.ed 431, 433, 2 S. Ct. 391.

It is noteworthy that Petitioner makes no attempt to explain the phrases in section 1278(b) (ii) relating to "additional periods." It even omitted these phrases in its petition when quoting section 1278(b) (Pet. 31).

The Court of Appeals properly concluded that section 1278(b) of the Wild and Scenic Rivers Act did not justify



a further stay of the Commission's licensing order for the Blue Ridge Project.

Finally, Petitioner argues that the Secretary of Interior's approval of the Governor of North Carolina's application to have a portion of the New River included in the national wild and scenic rivers system, renders the license for the Blue Ridge project invalid (Pet. 29). The Secretary approved the State's application April 13, 1976 – some 20 days after the Court of Appeals affirmed the FPC's licensing order for Blue Ridge. In support of its argument, Petitioner relies on section 7(a) of the Act, 16 U.S.C. §1278(a), which prohibits the Commission from licensing projects on rivers that are components of the national wild and scenic rivers system (Pet. 30). Petitioner then argues that because in its view the license is now a nullity, this case has become moot and this Court should direct dismissal of the licensing proceeding before the FPC (Pet. 33-35).

Essentially, Petitioner is arguing that the Secretary's approval of the State's wild and scenic river application terminates the Blue Ridge license issued nearly two years before the Secretary's action. Congress, however, provided in sections 26 and 313(b) of the Federal Power Act, 16 U.S.C. §§820, 825*l*(b), the exclusive method whereby FPC licenses can be revoked. Congress did not in the Wild and Scenic Rivers Act provide an additional method for the revocation of Commission licenses. In any event the construction of the Secretary of the Interior's April 13, 1976 designation is not before this Court.[12] This case

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[12] In this connection we would point out that the interpretation Petitioner places upon the Secretary's April 13, 1976 designation is not shared by the Solicitor's office of the Department of the Interior. See the legal memorandum of March 17, 1976 from the Associate Solicitor to the Solicitor which is attached hereto

[Footnote continued]

arises under section 313(b) of the Federal Power Act and can therefore relate only to those issues raised by Petitioner against the licensing order of the Federal Power Commission.

III.

**THE COURT OF APPEALS DID NOT ERR IN DIRECTING THE COMMISSION TO MODIFY THE LICENSE TO REQUIRE THAT LICENSEE PROVIDE THE NECESSARY TIME AND FUNDING TO COMPLETE THE ARCHAEOLOGICAL RESEARCH, EXCAVATION AND SALVAGE WORK FOR THE PROJECT AS A CONDITION OF THE LICENSING**

After the briefs were submitted, Petitioner, on September 11, 1975, filed with the Court of Appeals a motion for leave to adduce additional evidence. Petitioner contends that the action of the Court of Appeals in directing the Commission to modify the license with regard to archaeological work is not an adequate response to its motion (Pet. 35).

The "newly discovered evidence" upon which the motion was based consisted of three archaeological surveys in the New River Valley in the 1960's. The Petition correctly states that: "These surveys were only preliminary field work to determine whether sites relating to activities of prehistoric cultures were present within the project area." (Pet. 37). These preliminary surveys were

as Appendix B. The Assistant Secretary for Fish and Wildlife placed this memorandum in the record during recent Congressional hearings on the Blue Ridge Project. *See* Transcript of Proceedings, United States Senate Committee on Interior and Insular Affairs, Amendment No. 1559 to S. 158—New River, May 21, 1976, at 10; Transcript of Proceedings, Subcommittee on National Parks and Recreation of the House Committee on Interior and Insular Affairs, H.R. 12958 and H.R. 13372, May 6, 1976, at 65.



attached to Petitioner's motion. Thus they were before the Court. Moreover, none of the parties disputed or questioned any fact or conclusion in any of these surveys. Being uncontested they were accepted by the Court.

The jurisdiction of the Court of Appeals to modify the Commission's license order was established under section 313(b) of the Act when Petitioner filed its petition for review of that order.[13] Section 313(b) also gave the Court authority to order that additional evidence be taken before the Commission in such manner as to the Court may seem proper. In regard to the three preliminary surveys, because there was no dispute as to the facts contained therein, no useful purpose would have been served in sending the matter to the Commission to receive the surveys in evidence. Accordingly, the Court correctly exercised its discretion in the matter.

The Commission gave notice of the filing by the Company of both the application for a preliminary permit and the application for a license. The notice was given to the Secretary of the Interior as required by Section 2(a) of the Reservoir Salvage Act of 1960 (74 Stat. 220). Notice was also given to the Advisory Council on Historic Preservation in accordance with the Historic Properties Act of 1966 (16 U.S.C. §470f). In response to the notice, the Secretary of the Interior on November 2, 1962 advised the Commission that the project area contains archaeological value which should be salvaged if construction is undertaken. He recommended that if

[13] In pertinent part, section 313(b) provides:

> Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, *modify*, or set aside such order in whole or in part. (emphasis added).

the permit is granted the Company be required to consult with the Director, Bureau of American Ethonology, Smithsonian Institution concerning the cost of archaeological surveys and salvage. The Commission conditioned the permit in accordance with the recommendations of the Secretary of the Interior. The preliminary surveys were financed by the Company, but they were made under the auspices of the Smithsonian Institution.

Petitioner contends that these surveys were suppressed by the Company (Pet. 44-48). The Company received copies of these surveys but it is without knowledge regarding the extent of their circulation. It was the understanding of the Company, however, that to prevent vandalism of artifacts, the surveys should not be publicized.[14] In any event, that seems to be the policy of the United States Forest Service and the Antiquities Act of 1906 (16 U.S.C. §433). Moreover, that seems to be the policy of Petitioner. In the final Environmental Impact Statement issued by the Department of the Interior on March 12, 1976 on the proposed South Fork-New River Wild and Scenic River application by Petitioner it was noted at p. 261 that to prevent vandalism the State of North Carolina has classified the location of sites which it believes may contain historical artifacts.

Petitioner states that the National Environmental Policy Act (NEPA) requires that the Commission use all practicable means to preserve our historic and cultural heritage (Pet. 42). Pursuant to NEPA the Commission

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[14] The purpose of the surveys was to show the probable location of artifacts which the Secretary of the Interior had advised the Commission were in the project area.



staff studied twenty five (25) alternate pumped storage sites (R. 1087). Surely it would not be practicable for a potential licensee to preserve historical artifacts in any of the twenty six (26) project areas, including Blue Ridge, until a license is issued for one of them. All obligations in this regard are met by compliance with the terms and conditions of the license amended as directed by the Court, to comply with the Reservoir Salvage Act of 1960, as amended (16 U.S.C. 469 *et seq.*).

The Reservoir Salvage Act of 1960 was amended May 24, 1974 by P.L. 93-291 (88 Stat. 174) and is now codified at 16 U.S.C. 469-469c. That Act requires archaeological surveys only after a project has been authorized for construction and in advance of the construction and flooding authorized. The Commission's license order issued June 14, 1974 (Article 33) required that the Company continue to consult with the Smithsonian Institution to determine the extent of any archaeological survey and salvage excavations that may be necessary prior to construction or flooding and provide an amount of up to $7,500 for the necessary work. At oral argument before the Court of Appeals the Company acknowledged that $7,500 may not be adequate for the purpose and that funds necessary to complete the work would be provided by the Company to complete the work prior to the commencement of construction or flooding of the areas affected. The Court vacated its stay order and directed the Commission to amend the license accordingly. This the Commission did by its order issued March 26, 1976.

## IV.

### THE COURT OF APPEALS PROPERLY FOUND THAT THE COMMISSION ADEQUATELY CONSIDERED ENERGY CONSERVATION AS AN ALTERNATIVE TO THE BLUE RIDGE PROJECT

The Petitioner contends that the Court erred in finding that the Commission adequately considered energy conservation measures as an alternative to the Blue Ridge Project. While recognizing that the proper standard of review was the "rule of reason" test of *Natural Resources Defense Council v. Morton*, 458 F2d 827 (D.C. Cir. 1972), the Petitioner claims the Court misapplied this legal standard because of its failure to appreciate the nature of a pumped storage project (Pet. p. 44), i.e. a project which registers more kilowatt hours on a meter during the pumping phase than it does during the generating phase of its operations.[15]

The characteristics which make a pump storage project an extremely reliable and efficient source of peaking energy for the AEP system were fully explained by the Commission in its decision (R. 17503-504). The Commission devoted considerable attention to the increased demand for electric energy which all load projections in the record showed would be experienced on the AEP system in the 1980s and 1990s (R. 17507-508). The Commission, as found by the Court of Appeals, also considered the extent to which energy conservation measures could be expected to reduce the rate at which that demand for electric energy could be expected to grow (R. 17724-726).

[15] The number of kilowatt hours registered on a meter, however, is not a meaningful measurement of the value of a pumped storage project. A pumped storage project is essentially a storage battery which is charged by energy generated during off peak hours by thermal plants which would otherwise be idle or operating at a reduced load. Its operating characteristics were described by this Court in *FPC v. Union Electric Company*, 381 U.S. 90, 92 (1965). An important consideration in the economic evaluation of such projects is the amount of fuel which will be burned by all of a system's plants with and without a pumped storage plant to meet the same load. The FPC found that the AEP system plants will actually burn less coal with Blue Ridge in operation than if another coal fired plant were built in lieu of Blue Ridge (R. 17729-30). Thus Blue Ridge will be a *net-saver* of fuel, a fact never contested, or apparently even appreciated by Petitioner.



Petitioner disagrees with the Court's appraisal of the adequacy with which the Commission considered energy conservation as an alternative to Blue Ridge. It suggests that the Court misapplied the "rule of reason" legal standard because the Court assumed that a pumped storage project "is equally efficient in meeting both peak-load demand and increase in overall demand" (Pet. p. 44). The fundamental fact which Petitioner is ignoring is that Blue Ridge is not designed to meet a peak load of a few hours duration. The Project is designed to operate at full capacity during the entire daylight peak period, for up to 12 to 15 hours per day. (R. 17730). Thus Petitioner's confidence that conservation measures may reduce demand for energy during certain peak hours of the day, has little relevance to the kind of prolonged daily demands for which Blue Ridge is designed.

In view of the very full record which was developed on all of these technical matters during the FPC proceedings, we would suggest that the Court of Appeals properly concluded that the Commission's consideration of energy conservation measures as an alternative to Blue Ridge was adequate. The portions of the Commission's decision and of the final environmental impact statement quoted by the Court amply demonstrate

that consideration was given to this matter and that review by this Court of the lower court's judgment as to its adequacy is not warranted.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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July 29, 1976

# APPENDIX

## APPENDIX A

### Antiquities Act of 1906, 16 U.S.C. 433

Sec. 433. Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situate on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than $500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

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### Sections 4(f), 26, 309 and 313(b) of the Federal Power Act

Sec. 4(f). To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof: *Provided, however,* That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated. [41 Stat. 1066; 49 Stat. 841; 16 U.S.C. 797 (f)].

* * *

Sec. 26. That the Attorney General may, on request of the Commission or of the Secretary of the Army, institute proceedings in equity in the district court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission, or omission in violation of the provisions of this Act or of any lawful regulation or order promulgated hereunder. The district courts shall have jurisdiction over all of the above-mentioned proceedings and shall have power to issue and execute all necessary process and to make and enforce all writs, orders, and decrees to compel compliance with the lawful orders and regulations of the Commission and of the Secretary of the Army, and to compel the performance of any condition imposed under the provisions of this Act. In the event a decree revoking a license is entered, the court is empowered to sell the whole or any part of the project or projects under license, to wind up the business of such licensee conducted in connection with such project or projects, to distribute the proceeds to the parties entitled to the same, and to make and enforce such further orders and decrees as equity and justice may require. At such sale or sales the vendee shall take the rights and privileges belonging to the licensee and shall perform the duties of such licensee and assume all outstanding obligations and liabilities of the licensee which the court may deem equitable in the premises; and at such sale or sales the United States may become a purchaser, but it shall not be required to pay a greater amount than it would be required to pay under the provisions of section 14 hereof at the termination of the license. [41 Stat. 1076; 16 U.S.C. 820.]

* * *



Sec. 309. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [49 Stat. 858-859; 16 U.S.C. 825h].

* * *

Sec. 313(b). Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the applica-

tion for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided



in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347). [49 Stat. 860-861; 16 U.S.C. 8251(b)]

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**Historic Properties Act, 1966, 16 U.S.C. 470f**

Sec. 470f. The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470n of this title a reasonable opportunity to comment with regard to such undertaking.

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**Section 2(a) of the Reservoir Salvage Act of 1960, 74 Stat. 220**

Sec. 2 (a). Before any agency of the United States shall undertake the construction of a dam, or issue a license to any private individual or corporation for the construction of a dam, it shall give written notice to the Secretary of the Interior setting forth the site of the proposed dam and the approximate area to be flooded and otherwise changed if such construction is undertaken: *Provided,* That with respect to any floodwater retarding

dam which provides less than five thousand acre-feet of detention capacity and with respect to any other type of dam which creates a reservoir of less than forty surface acres the provisions of this section shall apply only when the constructing agency, in its preliminary surveys, finds, or is presented with evidence that historical or archeological materials exist or may be present in the proposed reservoir area.

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**Reservoir Salvage Act of 1974, 16 U.S.C. 469-469c**

Sec. 469. It is the purpose of sections 469 to 469c of this title to further the policy set forth in sections 461 to 467 of this title, by specifically providing for the preservation of historical and archeological data (including relics and specimens) which might otherwise be irreparably lost or destroyed as the result of (1) flooding, the building of access roads, the erection of workmen's communities, the relocation of railroads and highways, and other alterations of the terrain caused by the construction of a dam by any agency of the United States, or by any private person or corporation holding a license issued by any such agency or (2) any alteration of the terrain caused as a result of any Federal construction project or federally licensed activity or program.

Sec. 469a. Before any agency of the United States shall undertake the construction of a dam, or issue a license to any private individual or corporation for the construction of a dam, it shall give written notice to the Secretary of the Interior (hereafter referred to as the Secretary) setting forth the site of the proposed dam and the approximate area to be flooded and otherwise changed if such construction is undertaken: *Provided,*



That with respect to any floodwater retarding dam which provides less than five thousand acre-feet of detention capacity and with respect to any other type of dam which creates a reservoir of less than forty surface acres the provisions of this section shall apply only when the constructing agency, in its preliminary surveys, finds, or is presented with evidence that historical or archeological materials exist or may be present in the proposed reservoir area.

Sec. 469a-1 (a) Whenever any Federal agency finds, or is notified, in writing, by an appropriate historical or archeological authority, that its activities in connection with any Federal construction project or federally licensed project, activity, or program may cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data, such agency shall notify the Secretary, in writing, and shall provide the Secretary with appropriate information concerning the project, program, or activity. Such agency may request the Secretary to undertake the recovery, protection, and preservation of such data (including preliminary survey, or other investigation as needed, and analysis and publication of the reports resulting from such investigation), or it may, with funds appropriated for such project, program, or activity, undertake such activities. Copies of reports of any investigations made pursuant to this section shall be submitted to the Secretary, who shall make them available to the public for inspection and review.

(b) Whenever any Federal agency provides financial assistance by loan, grant, or otherwise to any private person, association, or public entity, the Secretary, if he determines that significant scientific, prehistorical, historical, or archeological data might be irrevocably

lost or destroyed, may with funds appropriated expressly for this purpose conduct, with the consent of all persons, associations, or public entities having a legal interest in the property involved, a survey of the affected site and undertake the recovery, protection, and preservation of such data (including analysis and publication). The Secretary shall, unless otherwise mutually agreed to in writing, compensate any person, association, or public entity damaged as a result of delays in construction or as a result of the temporary loss of the use of private or any nonfederally owned lands.

Sec. 469a-2 (a) The Secretary, upon notification, in writing, by any Federal or State agency or appropriate historical or archeological authority that scientific, prehistorical, historical, or archeological data is being or may be irrevocably lost or destroyed by any Federal or federally assisted or licensed project, activity, or program, shall, if he determines that such data is significant and is being or may be irrevocably lost or destroyed and after reasonable notice to the agency responsible for funding or licensing such project, activity, or program, conduct or cause to be conducted a survey and other investigation of the areas which are or may be affected and recover and preserve such data (including analysis and publication) which, in his opinion, are not being, but should be, recovered and preserved in the public interest.

(b) No survey or recovery work shall be required pursuant to this section which, in the determination of the head of the responsible agency, would impede Federal or federally assisted or licensed projects or activities undertaken in connection with any emergency, including projects or activities undertaken in anticipation of, or as a result of, a natural disaster.



(c) The Secretary shall initiate the survey or recovery effort within sixty days after notification to him pursuant to subsection (a) of this section or within such time as may be agreed upon with the head of the agency responsible for funding or licensing the project, activity, or program in all other cases.

(d) The Secretary shall, unless otherwise mutually agreed to in writing, compensate any person, association, or public entity damaged as a result of delays in construction or as a result of the temporary loss of the use of private or nonfederally owned land.

Sec. 469a-3 (a) The Secretary shall keep the agency responsible for funding or licensing the project notified at all times of the progress of any survey made under sections 469 to 469c of this title or of any work undertaken as a result of such survey, in order that there will be as little disruption or delay as possible in the carrying out of the functions of such agency and the survey and recovery programs shall terminate at a time mutually agreed upon by the Secretary and the head of such agency unless extended by mutual agreement.

(b) The Secretary shall consult with any interested Federal and State agencies, educational and scientific organizations, and private institutions and qualified individuals, with a view to determining the ownership of and the most appropriate repository for any relics and specimens recovered as a result of any work performed as provided for in this section.

(c) The Secretary shall coordinate all Federal survey and recovery activities authorized under sections 469 to 469c of this title and shall submit an annual report at the end of each fiscal year to the Interior and Insular Affairs Committees of the United States Congress indica-

ting the scope and effectiveness of the program, the specific projects surveyed and the results produced, and the costs incurred by the Federal Government as a result thereof.

Sec. 469b. In the administration of sections 469 to 469c of this title, the Secretary may—

(1) enter into contracts or make cooperative agreements with any Federal or State agency, any educational or scientific organization, or any institution, corporation, association, or qualified individual; and

(2) obtain the services of experts and consultants or organizations thereof in accordance with section 3109 of Title 5; and

(3) accept and utilize funds made available for salvage archeological purposes by any private person or corporation or transferred to him by any Federal agency.

Sec. 469c (a) To carry out the purposes of sections 469 to 469c of this title, any Federal agency responsible for a construction project may assist the Secretary and/or it may transfer to him such funds as may be agreed upon, but not more than 1 per centum of the total amount authorized to be appropriated for such project, except that the 1 per centum limitation of this section shall not apply in the event that the project involves $50,000 or less: *Provided,* That the costs of such survey, recovery, analysis, and publication shall be considered nonreimbursable project costs.

(b) For the purposes of section 469a-1(b) of this title, there are authorized to be appropriated such sums as may be necessary, but not more than $500,000 in fiscal year 1974; $1,000,000 in fiscal year 1975; $1,500,000 in



fiscal year 1976; $1,500,000 in fiscal year 1977; and $1,500,000 in fiscal year 1978.

(c) For the purposes of section 469a-2(a) of this title, there are authorized to be appropriated not more than $2,000,000 in fiscal year 1974; $2,000,000 in fiscal year 1975; $3,000,000 in fiscal year 1976; $3,000,000 in fiscal year 1977; and $3,000,000 in fiscal year 1978.

## APPENDIX B

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

17 MAR 1976

[SEAL]

Memorandum

To: Solicitor

From: Associate Solicitor, Conservation and Wildlife

Subject: Nomination of the New River for inclusion in the Wild and Scenic Rivers System.

On June 14, 1974 the F.P.C. issued a license, Order and Opinion No. 698, to become effective on January 2, 1975, to the Appalachian Power Company to proceed with the Blue Ridge Project, a proposal to build a hydroelectric pump storage project on the New River in Virginia. The State of North Carolina appealed the F.P.C. decision to the United States Court of Appeals for the District of Columbia, and a stay of the license was granted by the court on January 31, 1975 pending its decision. A decision has not yet been made.

On December 12, 1974 the State of North Carolina applied to the Secretary of the Interior to have a 26.5 mile segment of the New River which flows through North Carolina included in the National Wild and Scenic Rivers System. The headwaters of the New River are in North Carolina, and the Blue Ridge Project would flood most of the North Carolina portion of the New River. The application of North Carolina was made following the enactment of a state statute designating the New

River as a scenic river and the formulation of a plan to protect its scenic qualities. The state application has been circulated to interested federal agencies by the Secretary of the Interior, under 16 U.S.C. §1275(c), accompanied by an environmental impact statement on the effects of including the river in the system. The Secretary has not yet decided whether to include the river.

The Wild and Scenic Rivers Act, 16 U.S.C. §1271 *et seq.*, permits the Secretary of the Interior to include a state designated river in the system if he finds that the river qualifies under 16 U.S.C. §1273(b), and if it has been designated by a state statute and will be state managed, 16 U.S.C. §1273(a) (ii). The New River qualifies, and appropriate procedures have been followed to permit its inclusion in the system by the Secretary. Once a river has been included in the system, the F.P.C. is deprived of its jurisdiction to license a project that would affect the river:

> The Federal Power Commission shall not license the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act, as amended, on or directly affecting any river which is designated in section 1274 of this title as a component of the national wild and scenic rivers system or which is *hereafter designated for inclusion in that system* . . . 16 U.S.C. §1273(a). (Emphasis added).

ISSUE: Is the Secretary precluded from acting on the request due to the pending appeal before the Court of Appeals for the District of Columbia, *State of North Carolina v. Federal Power Commission?*

ANSWER: No.



The appeal of the F.P.C. license is pursuant to the Federal Power Act, 16 U.S.C. §3251(b). The Secretary is not a party before the court on appeal, and the Secretary's authority is not under review. Review is of the past proceedings before the Commission, a subject which cannot be changed by the Secretary's taking action on the application.

The State of North Carolina has complied with the requirements of the Wild and Scenic Rivers Act. As a factual matter, the river is currently free of impoundments and therefore qualifies as a "scenic" river under 16 U.S.C. §1273(b) (2). An existing dispute over the right to construct an impoundment does not deprive the Secretary of his authority under the Act.

ISSUE: If the Secretary includes the New River in the system, will that action in and of itself void or cancel the F.P.C. license?

ANSWER: No.

The Secretary of the Interior has no power under the Wild and Scenic Rivers Act to cancel an existing, valid license. Section 7 of the Act, 16 U.S.C. §1278, *supra*, is phrased in terms that address prospective actions. The sanction contains no express retroactive terms.

In addition, the legislative history of the Act indicates that Congress did not intend to cancel previously *approved* projects by including a river in the system. In discussing the effect of the section that lists rivers to be included in the initial system, 16 U.S.C. §1274(a), and rivers to be studied for later inclusion in the system, 16 U.S.C. §1276(a), the Chairman of the House Committee that reported the bill and the bill's sponsors and opponents stated in floor debates that the bill would not affect projects under construction or projects approved

prior to passage of the Act. See remarks of Congressmen Taylor, Aspinall, Steiger, 116 Cong. Record 21455-21456 (1968). In our opinion, the same rationale would apply to a river subsequently included in the system that was subject to a valid license at the time of inclusion.

ISSUE: If the Secretary approves the application of North Carolina and the court of appeals subsequently remands the licensing matter to the F.P.C. because of improper issuance, will the license become void?

ANSWER: Yes.

Under 16 U.S.C. §8251, the court of appeals, when reviewing an F.P.C. license, has jurisdiction "to affirm, modify, or set aside such [F.P.C.] order in whole or in part." If the order of the F.P.C. is set aside, then the previously issued license would become void. *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F.2d 608 (2d Cir. 1965), *cert. denied* 384 U.S. 941 (1966). If the court affirms or merely amends the order, the license would not become void. *Department of Fish and Game of State of California v. F.P.C.*, 359 F.2d (9th Cir. 1966) *cert. denied* 385 U.S. 932 (1966). The court could also remand a part of the order to require further consideration of limited aspects of the project (i.e. a need for fish ladders), thereby delaying but not cancelling the project. *Hudson River Fishermen's Ass'n. v. F.P.C.*, 498 F.2d 827 (2d Cir. 1974). Such action would be legally equivalent to affirming the F.P.C.

Thus, whether or not listing of the New River would preclude the construction of the Blue Ridge Project depends on the court of appeals and the outcome of any subsequent review by the Supreme Court. If the court



remands the case for a reopening of the licensing proceeding, the license would become void and the designation of the river would effectively prevent the F.P.C. from issuing a new license for the project. If on the other hand the court affirms the F.P.C., then the designation would not stop the project.

ISSUE: Did the December 12, 1974 application of North Carolina suspend the license?

ANSWER: No.

A state's application to Interior for the designation of a river does not operate to suspend F.P.C.'s authority to act for one year, or any period of time. This position is reflected in an opinion of the previous Associate Solicitor, Parks and Recreation dated April 22, 1969 and is perhaps implicit in a letter to the Governor of North Carolina from Secretary Morton dated March 25, 1974. This position rests on the premise that section 7(b), 16 U.S.C. §1276(b), is concerned with those rivers listed as section 5(a) "study" rivers by Congress, 16 U.S.C. §1276(a). The language of section 7(b) (ii) – concerning rivers recommended to the Secretary of the Interior for inclusion in the national wild and scenic rivers system under section 2(a) (ii), 16 U.S.C. §1275(a) (ii) only refers to state applications on study rivers and not to state applications for rivers not listed in section 5(a).

The affect of subparagraph (ii) is to give the states an opportunity to submit applications to the Secretary for the inclusion in the national system of rivers which have been studied pursuant to sections 5(a) and 4(a), 16 U.S.C. §1275(a), and have been recommended for state administration as a result of those studies. Under normal procedures, the study terms include interested state and local officials as well as the appropriate federal represen-

tatives. The one year period gives a state the opportunity to act under section 2(a) (ii) after a report containing a recommendation for state administration is submitted by the Secretary to the Congress.

A similar protection is not afforded to rivers which have not been listed in section 5(a) as potential additions to the national system, but which nevertheless have been recommended for inclusion in the system by a state under section 2(a) (ii). Those rivers not previously listed by the Congress as potential additions to the system, are not protected until they are designated by the Secretary as components of the system. Then the protections of section 7(a) fully apply.

The varying degrees of protection afforded the two types of section 2(a) (ii) rivers is logical given the careful consideration by Congress of potential or possible wild, scenic and recreation rivers throughout the country at the time the system was created. Aside from those rivers which were established as instant rivers, Congress determined that those rivers listed in section 5(a) were worthy of the greatest protection from adverse federal action. Under the design of the statute, mere state action designating a river as a part of a state scenic rivers system is not sufficient to stop federal action until such a river is included in the national system by secretarial approval.

Even assuming for the sake of argument that section 7(b) protects state nominated rivers not listed in section 5(a), 7(b) would not protect the New River because of the date the license was issued. In Opinion No. 698, issued June 14, 1974, the Federal Power Commission stated at page 73 that "the license *granted herein* shall become effective January 2, 1975, unless on that date there exists an Act of Congress that would delay or foreclose the Blue Ridge Project." (emphasis added). Through this language, there is little question the license was issued on the date of the opinion.



The fact that it was to become effective, subject to a condition subsequent that did not occur, does not appear to be important. Under section 309 of the Federal Power Act, 16 U.S.C. §925 (h), the F.P.C. has discretion as to when a license will become effective. Issuance and effective date need not be the same. Section 309 provides "Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe."

ISSUE: Would cancellation of the Blue Ridge Project by the F.P.C. or the court or Congress create any liability for a taking against the United States?

ANSWER: No.

Assuming that the court of appeals reverses and remands the case to the F.P.C. subsequent to a listing of the New River by the Secretary of the Interior, the United States would incur no liability to the Appalachian Power Company.

Under no circumstances would the United States be liable for expenses incurred incident to and prior to obtaining a license. There is no right or property interest taken, or contract breached, if the United States refuses to issue a license despite a potential licensee's substantial expenditures undertaken to obtain one. An absurd result would follow if the United States were liable for such costs.

The federal government is liable under an implied contract theory, under 28 U.S.C. §§1846, 1491, only if the contract is implied in fact, not in law. Equitable or moral

considerations, such as reasonable reliance do not create liability on the part of the government. *United States v. Minnesota Mutual Ins. Co.*, 271 U.S. 212 (1926); *Kote v. United States*, 95 U.S. 149 (1877); *Algonac Mfg. Co. v. United States*, 428 F.2d 1241 (Ct. Cl. 1970). Implied contract liability under 28 U.S.C. §§1346, 1491 must be based on evidence indicating both parties intended to create a contract, but failed to write one.

Likewise, since a license itself is not classifiable as property, courts generally do not allow compensation for the revocation or alteration of a license. It is well settled that a license is not a contract or a property right, Black's Law Dictionary 1067 (1968). *Rosenblatt v. California State Board of Pharmacy*, 158 P.2d 199. 203 (Cal. 1945); *American States Water Service Co. of California v. Johnson*, 38 P.2d 770, 774 (Cal. 1939); *Garford Trucking v. Hoffman*, 177 A. 832, 887 (N.J. 1935), nor does it create a vested right. *State ex rel Biscayne Kennel Club v. Stein*, 178 So. 133, 135 (Fla. 1933); *Asbury Hospigal v. Cass County*, 7 N.W. 2d 438, 452 (N.O. 1943). Rather a license is the permission granted by some competent authority to do some act which, without such permission, would be illegal. *State ex rel Zugravu v. O'Brien*, 196 N.E. 664 (Ohio 1935); *Solberg v. Davenport*, 232 N.W. 477, 480 (Iowa 1930); *Standard Oil Co. (Indiana) v. State Board of Equalization*, 99 F.2d 229, 234 (Mont. 1940); *Alabama Power Co. v. F.P.C.*, 128 F.2d 280, 289 (D.C. Cir. 1942).

It is also apparent that an F.P.C. "license" is a license, as that term is commonly used in the law. *Alabama Power Co., supra.* A license to obstruct or use navigable waters may be granted, denied or revoked by Congress according to what Congress determines to be in the public interest. *United States v. Appalachian Electric*



*Power Co.*, 311 U.S. 377, 426-428 (1940); *Northern States Power Co. v. F.P.C.*, 118 F.2d 141, 144 (7th Cir. 1941). In exercising this power, Congress incurs no liability on the part of the United States Government. *United States v. Commodore Park, Inc.* 324 U.S. 386 (1945); *Ford and Son, Inc. v. Little Falls Fibre Co.*, 280 U.S. 369 (1930); *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 419 (1926); *Economy Light v. United States*, 256 U.S. 113 (1921); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690 (1899); *Bridge Co. v. United States*, 105 U.S. 470 (1881); *Gibson v. United States*, 166 U.S. 269 (1897).

The rule of noncompensation would apply even if a particular economic loss suffered by Appalachian were cognizable as a property or contract right. The federal navigation servitude applies to all navigable waters and rights to use or store such waters:

> (1) The navigation servitude extends to the ordinary high-water mark of navigable streams and may be maintained at the level by artificial means.
>
> (2) Within that boundary line, title to all private property is defensible without compensation as against the exercise of the navigation power by the United States. Such property includes title to the stream bed, title to structures within the stream, access to the stream, title to abutting land up to the ordinary high-water mark and rights to the stream flow.
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> * * *
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> (6) Neither prior state nor congressional sanction of the right in question, nor prior congressional in-

> action, cause the sovereign to be estopped. A congressional recognition of the right as compensable [however] would be effective. Morreale, *Federal Power in Western Waters: the Navigation Power and the Rule of no Compensation,* 3 Nat. Res. Journal 1, 62-63 (1963), footnote citations omitted.

Thus, Congress can order the removal of a privately owned bridge, notwithstanding previous congressional sanction of it, without effecting a compensable taking, *Union Bridge Co. v. United States,* 204 U.S. 364 (1907); *Bridge Co. v. United States, supra.* The federal government can require the removal of a private power plant erected on submerged lands of a navigable river without paying compensation, *United States v. Chandler-Dunbar Water Power Co., supra.* Similarly, it can destroy privately-owned oyster beds by dredging, *Lewis Blue Point Oyster Cultivation Co. v. Briggs,* 229 U.S. 92 (1913), and require the removal of private wharves, *Greenleaf Johnson Lumber Co. v. Garrison,* 237 U.S. 251 (1915); *Willnik v. United States,* 240 U.S. 572 (1916). It is clear that this noncompensation rule applies to F.P.C. projects, except to the extent that the license is protected from subsequent modification by 16 U.S.C. §822 (1970). See *F.P.C. v. State of Oregon,* 349 U.S. 435 (1955); *Arkansas Power and Light Co. v. Federal Power Commission,* 125 F.2d 932 (8th Cir. 1942).

Section 822 is a grandfather clause protecting F.P.C. licensees from retroactive alterations of their licenses by Congress. It has been held, however, that this provision was intended only to protect licensees from *ex post facto* law-making relating specifically to licensing requirements and that it was not intended to insulate licenses from the effects of general congressional legislation. *Scenic Hudson Preservation Conference v. Calloway,* 370 F. Supp. 162 (S.D. N.Y. 1973), affirmed 499 F.2d 127 (2d Cir. 1974). In the present case, this clause would have no applicability if the court were to void the currently stayed license by remanding to the F.P.C.



Thus, it seems clear that the government would not be liable for expenditures to obtain the license or for rights, including lost profits, to use the license. Concerning the issue of whether the United States would be liable in quantum merit for expenditures incurred in reliance on the license after its issuance, the implied contract and navigational servitude cases would seem to indicate there would be no cause of action. Furthermore, in Appalachian's case, the license did not become effective prior to January 2, 1975, and the license was stayed shortly after its effective date by the court of appeals.

Under these circumstances, it would be difficult for Appalachian to state a cause of action against the United States if its license were cancelled.

ISSUE: Does the National Environmental Policy Act (NEPA) prevent the Secretary from acting on the application within 30 days of filing the final environmental impact statement (EIS)?

NEPA, 42 U.S.C. §4321 *et seq.* requires that the EIS be available to the decision maker throughout the decision making process. See *Calvert Cliffs Coordinating Com. v. A.E.C.,* 449 F.2d 1109 (D.C. Cir. 1971). CEQ, in its guidelines on NEPA, states that:

> To the maximum extent practicable no administrative action subject to section 102(2) (c) is to be taken sooner than . . . thirty (30) days after the final text of an environmental statement (together with comments) has been made available to the Council

commenting agencies, and the public. 40 C.F.R. 1300.11(b).

The CEQ guideline has been adopted almost verbatim in the Department's own regulations at 516 D.M. 2.9C(3).

It has been questioned whether the Secretary may act on the New River application prior to the expiration of the 30 day waiting period. While courts differ over the issue of whether CEQ's guidelines are binding, see cases discussed in E.L.I., Federal Environmental Law pp. 254, 255 (1974), the fact that the Department's regulations have adopted the CEQ guidelines moots this issue. An agency's own regulations are binding on it. See e.g., *Hiram Clarke Civic Club v. Lynn*, 476 F.2d 421 (5th Cir. 1973). Thus, we would conclude that the Secretary must not act on the application prior to the end of the 30 day period unless for some reason waiting is not practicable.

Departmental guidelines permit "alternative arrangements" to the 30 day period when emergency circumstances, overriding considerations of expense to the Government, or impaired program effectiveness make it necessary to take action with significant environmental impact without observing the time limitations." 516 D.M. 2.9C(4). While it might be argued that the proposed action does not have significant environmental impacts, the EIS has been prepared on the assumption that it does (i.e. forgone hydroelectric power production requiring substitute production by polluting plants). Therefore, we would recommend postponement of the implementation of the decision for the required 30 days.

Postponement need not, however, preclude an announcement of the Secretary's intended action. The final EIS has been prepared and is available to the decision maker.



The EIS itself assesses environmental impacts of a proposed action. Announcement of what action is intended at the end of 30 days is no more offensive than proposing an action prior to making an environmental assessment of it. Postponing implementation would still permit affected persons to respond to the action and to bring matters to the Secretary's attention prior to implementation.

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